No. 77-885

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

COUNTY OF SUFFOLK and CONCERNED CITIZENS OF MONTAUK, INC., *Petitioners,*

v.

SECRETARY OF THE INTERIOR
NATIONAL OCEAN INDUSTRIES ASSOCIATION, *et al.,*
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

E. EDWARD BRUCE
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

GENE W. LAFITTE
LISKOW & LEWIS
1 Shell Square
New Orleans, Louisiana 70139

Attorneys for Respondents, National Ocean Industries Association, et al.

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-685

COUNTY OF SUFFOLK and CONCERNED CITIZENS OF MONTAUK, INC., *Petitioners,*

v.

SECRETARY OF THE INTERIOR
NATIONAL OCEAN INDUSTRIES ASSOCIATION, *et al.,*
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, National Ocean Industries Association ("NOIA") and the eleven NOIA members who, like NOIA, appeared as intervenor-defendants-appellants below, herein oppose the petition for certiorari filed on November 14, 1977, by County of Suffolk and the Concerned Citizens of Montauk, Inc.[1]

---

[1] Joining NOIA in this opposition are Continental Oil Company, Diamond M. Drilling Company, Digicon, Inc., Dresser Industries, Inc., Houston Oil & Minerals Corporation, Levingston Shipbuilding Company, Murphy Oil Corporation, National Supply Company, Ocean Production Company, Transco Companies, Inc., and Zapata Corporation.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly complied with F.R.C.P. 52(a), in applying the "clearly erroneous" standard prescribed by that rule only to the District Court's findings of fact and not to its general conclusion that the Environmental Impact Statement ("EIS") for Outer Continental Shelf ("OCS") Sale No. 40 was inadequate under the National Environmental Policy Act ("NEPA")?

2. Whether the Court of Appeals properly took into consideration the Secretary of Interior's continuing regulatory authority and environmental scrutiny of OCS operations in determining that the Sale No. 40 EIS satisfied the requirements of NEPA?

3. Whether the Court of Appeals properly reversed the District Court's conclusion that the Secretary of the Interior's decision to proceed with Sale No. 40 was "arbitrary and capricious"?

STATEMENT OF THE CASE

Petitioners seek review of an opinion written by Circuit Judge Mansfield for a unanimous panel of the United States Court of Appeals for the Second Circuit, which reversed the judgment of the United States District Court for the Eastern District of New York (Judge Jack B. Weinstein) that had declared OCS Sale No. 40 "null and void." In summarizing the conclusions reached in its opinion, the Second Circuit held:

> "The district court appears to have allowed its views regarding the substance of the Secretary's proposal to becloud its understanding of its reviewing function and its analysis of the Sale No. 40 EIS for adequacy, leading to the court's unfortunate characterization of the Secretary's motives, its substitution of testimony received by it for that considered by the Secretary, and its adoption *sua sponte* of grounds for inadequacy that were not suggested by the parties." (Petn. A43).

The litigation underlying the Second Circuit's opinion began in February 1975 when Suffolk and Nassau Counties, as well as six other plaintiffs from those counties, filed a complaint which challenged on broad policy and legal grounds any leasing of federal Atlantic OCS properties for the development of oil and gas. This complaint, which Montauk adopted when it intervened in this case, was lodged 15 months prior to the publication of the Sale No. 40 EIS and accordingly did not identify any specific NEPA defects in the Department of Interior's environmental analysis of Sale No. 40.

Following the publication of the Sale No. 40 EIS, the State of New York and the Natural Resources Defense Council ("NRDC") filed a joint complaint alleging specific NEPA deficiencies in that EIS.[2] The New York/NRDC complaint was consolidated with the Suffolk/Nassau/Montauk complaint for purposes of hearings on the former's motion for a preliminary injunction.

---

[2] Neither NRDC, the State of New York, Nassau County nor any of the other six original plaintiffs have joined Suffolk and Montauk in seeking to invoke this Court's certiorari jurisdiction.

Judge Weinstein conducted eleven days of hearings on that motion. At the conclusion of those hearings, he entered a 79-page order dated August 13, 1976, which upheld the adequacy of the EIS with respect to all the issues raised by plaintiffs:

> "[O]n balance, the impartial reader of the EIS is driven to the conclusion that, within the limit of reasonable researchers and writers, a studied effort was made to present a fairly grim picture of possible environmental difficulties. If anything, the studies are almost too detailed and encyclopedic for the lay executive to fully comprehend. The Final EIS Sale No. 40, together with the PDOD prepared by staff to summarize and clarify the issue for decision, satisfactorily meet both the spirit and the letter of NEPA requirements in all respects except one . . . ." (JA 186).

Notwithstanding his general validation of the EIS and specific rejection of all the plaintiffs' theories, the district judge determined to enjoin Sale No. 40 because of a single purported defect in the EIS which he identified upon the close of all the evidence taken at the preliminary injunction hearings—that the EIS's discussion of state or local authority over the pipelines used to transport OCS oil to shore gave inadequate attention to possible difficulties that might subsequently be experienced in obtaining permits for those pipelines. (JA 216-221).

Since Sale No. 40 was scheduled to take place on August 17, 1976, the NOIA and federal defendants immediately applied to the Second Circuit for a stay of the August 13 preliminary injunction, and on August 16 a unanimous panel of the Second Circuit, after oral argument, issued that stay. Plaintiffs

then applied to Mr. Justice Thurgood Marshall as Circuit Justice in an attempt to reinstate the preliminary injunction and thus bar the sale. In denying plaintiffs' application, Mr. Justice Marshall held:

> "[T]he sole question at issue is whether the District Court properly applied the controlling standards in concluding that the EIS lacked information concerning state regulation of shorelands which was 'reasonably necessary' for evaluating the project. That question appropriately is for the Court of Appeals, and I do not believe that four Members of this Court would vote to grant a writ of certiorari to review its conclusion on such a fact-intensive issue." 429 U.S. 1307, 1311 (1976).

On August 17, immediately after the oral announcement of Mr. Justice Marshall's decision, Sale No. 40 took place, with successful bidders paying more than $1.1 billion to the federal government for leases on 93 separate Sale No. 40 tracts.[3] (Petn. A9).

Then, on October 14, 1976, after full briefing and oral argument, another panel of the Second Circuit unanimously reversed the preliminary injunction order, both on grounds of the plaintiffs' failure to show irreparable injury and their inadequate proof of probable success on the merits. As to this latter point, the Court of Appeals held:

---

[3] Although referred to as "sales," OCS transactions of the type at issue here involve the issuance of leases which give lessees the right to explore for and then develop and produce oil or gas underlying their tracts. See 43 U.S.C. § 1337. These leasehold rights are sold for substantial cash bonuses via a competitive bidding system. They also entail the obligation of paying the federal government annual rentals and substantial royalties, the latter of which Interior has estimated could range between $900 million and $3.3 billion for Sale No. 40. (JA 3156).

> "[T]he probability of success on the merits . . . has now been more fully briefed and argued and we have been able to review a more complete record, including the Programatic Environmental Impact Statement and the EIS for Sale No. 40. These documents, totaling almost 5,000 pages, contain numerous references to the possible lack of State cooperation relative to pipe line location and usage and the alternative use of tankers. An evaluation of these statements measured by the 'practical rule of reason' creates some doubt as to the probabilities of plaintiffs' success on the merits." (JA 365).

None of the plaintiffs sought this Court's review of the Second Circuit's October 14, 1976, decision. Instead, the matter returned to the trial court, where in January 1977 Judge Weinstein heard six more days of testimony, and then, on February 17, 1977, rendered his final opinion in this case. (Petn. A47).

As the Second Circuit noted in the opinion now under review, the district judge once again based his decision on the ground that the EIS "'virtually ignored' the powers of state and local governments along the coast to block or impose heavy burdens on pipelines." (Petn. A12). Moreover, just as the district judge had originally unearthed this issue at the preliminary injunction stage, he discerned additional support for it in the January 1977 trial record on the basis of theories which he originated and evidence which he developed through his own interrogation of witnesses.

Thus, despite the fact that plaintiffs had at no time in their pleadings, pretrial memoranda, or evidence complained of the EIS's failure to designate particular pipeline corridors, the district judge relied upon a pipeline economic feasibility study prepared by one of NOIA's witnesses to hold that the EIS must define the locations of pipelines that might one day be laid from the Sale No. 40 area.[4] As the Second Circuit observed, however, the witness's own testimony was that it was "very premature at this time to speculate as to an exact routing" for pipelines (Petn. A22)—a point conceded by plaintiff NRDC, who agreed that the NOIA witness's

> "potential pipeline routes were picked only for their economic feasibility. Even the first glance shows they are unlikely to go where they were drawn on the map . . . ." (NRDC Post-Trial Memo. pp. 9-10).

The district court also held that the decision to go forward with Sale No. 40 was "arbitrary and capricious", because it was based upon allegedly mistaken assumptions in an internal decisional memorandum (PDOD) concerning the investment required by industry to explore and develop the Sale No. 40 region and the possible future rates of production of oil and gas in that area. (Petn. A97). As the Second Circuit observed, the District Court "based these conclusions entirely on the testimony of . . . an economist called by plaintiffs . . . and on documentary evidence relied on by [him]" (Petn. A28), both of which consisted "primarily of opinions and estimates" that were "fur-

---

[4] In the words of the Second Circuit, NOIA had introduced this evidence to show "that pipelines could be used economically over long and circuitous routes" (Petn. A20), in response to the trial court's previously expressed concern that vetoes of pipelines by particular shore communities might necessitate the tankering of oil to shore.

nished without benefit of certain essential relevant facts." (Petn. A33).

In the light of these purported violations of NEPA, as well as others not now pressed by petitioners, the district judge declared Sale No. 40 "null and void." (Petn. A123).

Once again, the NOIA and federal defendants returned to the Second Circuit to seek appellate review of the district judge's decision to invalidate OCS Sale No. 40. In view of the showing by NOIA that the continuing cloud cast by this decision upon the $1.1 billion of Sale No. 40 leases had resulted in losses running to several million dollars *per week* to the lessees, their contractors and thousands of employees, and in view of the public interest in the rapid development of any oil or gas which may underlay the Sale No. 40 region, the Second Circuit granted defendant-appellants' motion for an expedited appeal.

On August 25, 1977, the Second Circuit, speaking through Judge Mansfield, rendered its third unanimous decision in this case and, for the third time, concluded that the trial court had erred. (Petn. A1). It is this decision which is attacked by Suffolk County and Citizens of Montauk, alone among the eleven plaintiffs that originally challenged Sale No. 40, in their petition for a writ of certiorari.

REASONS FOR OPPOSING THE WRIT

Petitioners stress the national significance of the Sale No. 40 project, a matter which we do not dispute. However, the legal issues which they raise in further prolonging the litigation that clouds the status of this

project, such as the application of F.R.C.P. 52(a) by the Second Circuit, are not significant and do not justify the exercise of this Court's certiorari jurisdiction. Moreover, the consistency of Judge Mansfield's carefully written opinion with a long line of authority rejecting the very contentions relied upon by the district court,[5] the unanimity of three separate panels of the Second Circuit in this case, and the withdrawal from the litigation of NRDC, the State of New York, Nassau County and six other plaintiffs, underscore the obvious lack of merit in petitioners' position here.

I

With respect to their first issue presented, petitioners argue that since the trial court's findings as to the EIS were based on documentary proof and other evidence unrelated to testimonial credibility, the appellate court believed it was entitled to apply the "rule of reason" in reviewing those findings, rather than the "clearly erroneous" standard of F.R.C.P. 52(a). (Petn. 19-20). But the Second Circuit's discussion of the scope of review issue reveals petitioners' characterization to be entirely inaccurate. As it noted at the very outset:

> "To the extent that Judge Weinstein's findings resolved any disputed issues of evidentiary fact

---

[5] *See* Sierra Club v. Morton, 510 F.2d 813, 823-24 (5th Cir. 1975) (rejecting the argument that pipeline corridors must be specified in an EIS); NRDC v. Morton, 458 F.2d 827, 837-38 (D.C. Cir. 1972) (excusing an OCS impact statement from speculating about the effects of changes in an OCS project occasioned by possible modification of policies of other agencies); People of California v. Morton, 404 F. Supp. 26 (C.D.Cal. 1975), on appeal, 9th Cir. No. 76-1431 (rejecting the proposition that an environmental analysis must accompany the tract-selection phase of an OCS project).

> we are, of course, governed by the mandate of Rule 52(a), F.R.Civ. P., that they 'shall not be set aside unless clearly erroneous.'" (Petn. A10-A11).

As the Second Circuit went on to observe, however, a trial court's determination that an impact statement does or does not satisfy the "rule of reason"[6] under NEPA

> "although it may be labeled a 'finding' by the district court, is not strictly a finding of fact but rather an exercise in judgment as to what is reasonable under given circumstances which, of course, may vary from case to case." (Petn. A12).

Thus, the Second Circuit properly applied the "clearly erroneous" standard to the trial court's findings of fact. It left those "evidentiary findings . . . undisturbed" and reviewed "on the undisputed facts" the District Court's determination as to "what could reasonably be demanded of the EIS in issue."[7] (Petn.

[6] *See, Sierra Club* v. *Morton*, 510 F.2d 813, 819 (5th Cir. 1975); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) for a further articulation of the NEPA "rule of reason" as it applies to OCS transactions. *See also*, NRDC v. Callaway, 524 F.2d 79, 88 (2d Cir. 1975).

[7] For example, it was undisputed that the placement of OCS pipelines depends on a number of factors—the size and location of the oil discovered, its distance from shore, the type of oil discovered, its final destination, the ocean bottom characteristics—none of which were or could have been known prior to the publication of the Sale No. 40 EIS. Thus, the Second Circuit properly held on these undisputed facts that, although it was possible to project hypothetical pipeline routes, such a "speculative exercise," which would "not yield information of practical use to the Secretary," was not required by the NEPA rule of reason. (Petn. A18-A19).

A12). In short, the Second Circuit reversed Judge Weinstein for his failure to properly apply the "rule of reason;" it did not substitute that rule for the "clearly erroneous" standard in dealing with his findings of fact. (Petn. A12).

The merit of the Second Circuit's analysis speaks for itself. It is, after all, only "findings of fact [that] shall not be set aside unless clearly erroneous" under Rule 52, and the Second Circuit expressly disavowed disturbing the district court's findings of fact as to the EIS.[8] Moreover, this Court, just like the Second Circuit, has made clear the distinction between reviewing the facts found by a trial court under Rule 52 and reviewing the erroneous application of the law to those facts. *See, e.g., United States* v. *Mississippi Valley Gen. Co.*, 364 U.S. 520, 526 (1961); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 43-44 (1960); *Dalehite* v. *United States*, 346 U.S. 15, 24 n. 8 (1953). *See, also, Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 327 (1975) where this Court reviewed the record compiled by a three-judge district court in reversing its determination that a NEPA impact statement was inadequate, without even considering whether such appellate review was limited by Rule 52.

II

Petitioners contend in their third question presented that the Second Circuit assumed the Secretary could require the substantial modification or even

[8] As to non-EIS issues, where some of the district court's findings were disturbed—*i.e.* its determination that the PDOD was not compiled in good faith—the Second Circuit properly applied Rule 52 by concluding that the district court was "clearly erroneous." See Petn. A35.

abandonment of the Sale No. 40 project and thus rendered a decision in conflict with the Ninth Circuit's decision in *Union Oil Co.* v. *Morton,* 512 F.2d 743 (9th Cir. 1975). (Petn. 25).[9] It is, of course, true that the Second Circuit, in applying the "rule of reason" to judge the adequacy of the EIS, discussed at some length the Secretary's continuing power to exercise future environmental scrutiny and to regulate the stages of the Sale No. 40 project:

> "[W]here a multistage project can be modified or changed in the future to minimize or eliminate environmental hazards disclosed as the result of information that will not become available until the future, and the Government reserves the power to make such a modification or change after the information is available and incorporated in a further EIS, it cannot be said that deferment violates the 'rule of reason.'" (Petn. A18).

In this respect, the Second Circuit followed exactly the same principles as the Fifth Circuit in the analogous *Sierra Club* v. *Morton* case,[10] and recognized, as

[9] Petitioners assert that the Second Circuit's reliance on Interior's continuing regulation was "*sua sponte.*" (Petn. 24) The fact is, both NOIA (Opening Br. 18-19, Reply Br. 12-13) and the federal defendants (Opening Br. 13-17, 25-26, Reply Br. 3-6) strongly urged Interior's continuing regulatory authority be considered in evaluating the adequacy of the EIS, a point confirmed by the Second Circuit's own discussion of the defendant-appellants' argument. See Petn. A14.

[10] "[An OCS sale] does not involve a single undertaking or a project which becomes a *fait accompli* the day the decision to proceed is made. Because it contemplates numerous successive lessor-lessee relationships involving activities over many areas and over many years, the agency's continuing opportunity for making informed adjustments has a major effect upon our evaluation of the sufficiency of the materials contained in the EIS itself." 510 F.2d 813, 828 (1975).

did this Court in *Kleppe* v. *Sierra Club,* 427 U.S. 390, 412 (1976), that NEPA "properly le[aves] to the informed discretion of the responsible federal agencies" the determination of when impact-statement analysis should be performed upon inter-related phases of a proposed project.

The Ninth Circuit's *Union Oil* decision, far from conflicting with the opinion below, was in fact relied upon by the Second Circuit to support its discussion of the Secretary's regulatory authority. (Petn. A26). To be sure, *Union Oil* did hold that the Secretary could suspend OCS leases only for reasonable regulatory purposes and could not indefinitely suspend them in a manner constituting a confiscatory taking of leasehold rights.[11] But nothing in the opinion of the Second Circuit suggests the sanctioning of such confiscation; the emphasis is instead solely upon the Secretary's "power to regulate" (Petn. A24) as an element bearing upon application of the rule of reason to test the adequacy of the EIS.

III

In their second question presented, petitioners complain of the inadequacy of the administrative record in this case and argue that the District Court, in reviewing the cost-benefit aspects of Sale No. 40 under NEPA, was required to

> "immers[e] itself in and scrutiniz[e] the record *as a whole,* including its supporting materials and evidence on technical and specialized matters,

[11] Compare Gulf Oil Corp. v. Morton, 493 F.2d 141 (1973), where the Ninth Circuit upheld the reasonable regulatory exercise of Interior's power to suspend OCS operations.

to enable it to penetrate to the underlying decisions of the Secretary." (Petn. 22).

On this basis, petitioners contend that the district court properly credited in full their witness's critical opinions of the financial and economic, not environmental, data underlying Interior's decision to proceed with Sale No. 40 in finding that decision to be "arbitrary and capricious." [12]

Even if the unprecedented reliance by the district judge on non-environmental evidence in a NEPA case is ignored,[13] his treatment of the evidence exposes his

[12] At several points, petitioners seek to leave the impression that the PDOD consisted of no more than two or three pages of tabulated information. (Petn. 4, 10 n.2). The fact is, the PDOD for Sale No. 40 was a 67-page document that set forth a wide array of policy, environmental, economic, financial and other data bearing upon the Sale No. 40 decision. (JA 3148-3215).

Similarly, petitioners repeatedly contend that the Second Circuit mistakenly assumed that the PDOD was attached to the Sale No. 40 EIS and circulated through the NEPA review process. (Petn. 4-5, 13). But see Petn. A33, where the Second Circuit observed that, "the PDOD . . . was not circulated along with the draft EIS at all and was not made available to plaintiffs until they obtained it by court order after the final EIS had been published." *See also* Petn. A29-A30 where the Second Circuit properly recognized the status of the PDOD as an "internal deliberative memorand[um]."

[13] So far as we are aware, other than the case now before the Court, there is only one other appellate court decision reviewing the holding by a trial court that an action was "arbitrary and capricious" under NEPA. That appeal, which involved environmental, not economic or financial data, resulted in the reversal of the trial court. Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1307-08 (8th Cir. 1976), *rev'g*, 401 F.Supp. 1276 (D.Minn. 1975).

error in dealing with the PDOD. The disposition of the pipeline cost issue is illustrative of that error.

In concluding that the PDOD had understated pipeline costs, the district judge adopted verbatim the general testimony offered by Suffolk County and wholly ignored NOIA's evidence, which consisted of the testimony of a pipeline planning engineer who, prior to the litigation, had made a specific pipeline economic feasibility study for Sale No. 40 which utilized pipeline cost figures very close to those subsequently recited in the PDOD.[14]

Thus, the trial judge's approach to the evidence was that he could credit plaintiffs' evidence in order to conclude the economic and financial data underlying the Sale No. 40 decision was so inaccurate that it made the decision "arbitrary and capricious," even though the data relied upon by Interior was supported by other competent evidence.

Once again, the Second Circuit fully and correctly explained its reasons for rejecting the district court's application of NEPA in this case:

> "The district court does not sit as a super-agency empowered to substitute its scientific expertise or testimony presented to it *de novo* for the evidence received and considered by the agency which prepared the EIS." (Petn. A28).
>
> "Evidence-weighing must be left to the agency making the policy decision. Were the court to in-

[14] The trial court's disregard of this testimony cannot be explained by any doubts about the witness's credibility. As the Second Circuit noted (Petn. A34), the trial judge had credited NOIA's witness's testimony "in full" because he was "impressed by [his] skill and honesty." (Petn. A84).

vade that province, the judiciary rather than the agency would become the policy-maker." (Petn. A29; citation omitted).

The Second Circuit's refusal to sanction the district court's intrusion into the policy-making function of the Executive is faithfully consistent with all other NEPA authority in this Court, *Kleppe* v. *Sierra Club, supra,*[15] as well as the views of every other appellate court that has considered the matter, *see, e.g., Scenic Hudson Pres. Conf.* v. *FPC,* 453 F.2d 463, 481 (2d. Cir. 1971), *cert. denied,* 407 U.S. 926 (1972); *NRDC* v. *Morton,* 458 F.2d 827, 838 (D.C. Cir. 1972); *Silva* v. *Lynn,* 482 F.2d 1282, 1287 (1st Cir. 1973).

That Suffolk County/Montauk would, in the face of the unanimous views of all the courts that have ever considered the matter, so strongly urge this Court to sanction the extraordinary approach to the evidence taken by the district court in this case glaringly reveals that their petition is utterly without merit.[16]

---

[15] "The only role for a court [under NEPA] is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' " (427 U.S. at 410 n.21).

[16] The same conclusion applies to petitioners' reliance upon the grant of certiorari in NRDC v. NRC, 547 F.2d 633 (D.C.Cir. 1976), to review the lower court's decision that an agency conducting an APA rule-making proceeding did not allow an opportunity for sufficient development of the environmental issues posed by the agency's action. Suffolk County declined to file any comments with respect to Interior's environmental analysis of the sale and instead merely filed the interrogatories which it had previously served upon the federal defendants in this litigation. By the same token, petitioners never complained, either to the district court or to the Court of Appeals, about any limitations in submitting evidence to Interior. That such a complaint would have been without foundation can be seen from the EIS itself, which devotes more than 400 pages (III EIS 10-474) to the discussion and analysis of comments upon the draft EIS by federal agencies, state and local governments and members of the general public.

CONCLUSION

For the reasons stated herein, Suffolk County and Montauk's petition should be denied.

Respectfully submitted,

E. EDWARD BRUCE
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

GENE W. LAFITTE
LISKOW & LEWIS
1 Shell Square
New Orleans, Louisiana 70139

Attorneys for Respondents, National Ocean Industries Association, et al.